Supreme Court, U.S.
FILED
APR 8 1998
OFFICE OF THE CLERK

No. 97-1302

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE COMPENSATION INSURANCE AUTHORITY and COLORADO COMPENSATION INSURANCE AUTHORITY,
Petitioners,
vs.
MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

I. QUESTIONS PRESENTED BY CONDITIONAL CROSS-PETITIONER FOR REVIEW

1. Whether the Court of Appeals (and the Colorado Supreme Court in denying certiorari) erred in holding that Petitioners State Compensation Insurance Authority, State Compensation Insurance Fund and Colorado Compensation Insurance Authority (hereinafter referred to collectively as "CCIA") is a "public entity" thereby entitling it to governmental immunity?

2. Whether the Court of Appeals (and the Colorado Supreme Court in denying certiorari) erred in holding that Colo. Rev. Stat. § 8-45-101 (1997), which purportedly confers governmental immunity on CCIA, is constitutional?

3. Whether the Court of Appeals (and the Colorado Supreme Court in denying certiorari) erred in affirming the Trial Court's dismissal of Mr. Simon's invasion of privacy claim based upon federal law on the grounds that it was preempted by the Colorado Governmental Immunity Act (hereinafter "GIA")?

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

II. STATEMENT OF THE CASE

Mark Simon and other members of his family filed a lawsuit in April 1993, in a Colorado state district court against the Colorado Compensation Insurance Authority and two of its predecessor entities (these state compensation insurance authorities or funds will be referred to collectively as "CCIA"). (The Simons' amended complaint is set forth at App. I to CCIA's Petition.) The Simons alleged that Mr. Simon had purchased workers' compensation insurance from CCIA prior to his injury in January 1985 in the course and scope of his employment, but that CCIA improperly denied Mr. Simon's workers' compensation claim and forced him to engage in lengthy litigation before an administrative body to enforce his claim. The Simons also alleged that Mr.

Simon became involved in the legislative processes that related to Colorado workers' compensation law and that CCIA allegedly released private and false information regarding Mr. Simon in an attempt to discredit him as part of this legislative effort.

The Simons alleged in their first claim for relief that CCIA wrongfully failed to pay benefits due under Mr. Simon's workers' compensation insurance policy and committed other wrongful acts, resulting in a deprivation of rights secured by federal law, including a violation of the Fourteenth Amendment rights to equal protection and due process, entitled Simons to a damages remedy under 42 U.S.C. § 1983 ("§ 1983"). The amended complaint also included six state law-tort claims. The Seventh Claim asserted Defendants' "published" false confidential and/or private statements about Plaintiff Mark Simon in violation of Colorado Federal law.

CCIA, through the Colorado Attorney General, filed a motion to dismiss the amended complaint under Colo. R. . P. 12(b)(1) and (5) for lack of jurisdiction and a failure to state a claim upon which relief could be granted. On September 27, 1993, the Denver District Court granted the motion to dismiss. App. F. to CCIA's Petition. The District Court dismissed the claim under § 1983 because CCIA is not a "person" within the meaning of that statute. The district court also held that the six state law-tort claims, including Simon's privacy claim were barred by the Colorado GIA.

The decision of the District Court was affirmed by the Colorado Court of Appeals on December 15, 1994, in an original and a modified order. Appendices D and E to CCIA's Petition.

Contrary to plaintiffs' representation that all of the issues raised in their Conditional Cross Petition were presented to the Denver District Court and again at each stage of appeal, plaintiffs' third issue concerning Mr. Simon's privacy rights as a federal claim was only raised at the Colorado Supreme Court level. The decisions of the Denver District Court, Colorado Court of Appeals, and Colorado Supreme Court are set forth respectively as Appendices F, D and E, and A to CCIA's Petition for Writ of Certiorari. Simons' Response Brief to Defendants' Motion to Dismiss in the Denver District Court is set forth as Appendix A to this Brief. Simons' Opening and Reply Brief in the Colorado Court of Appeals are set forth as Appendices B and C. Various Colorado statutes referenced in this brief which are not included in App. H to CCIA's Petition are set forth in App. D to this Brief.

III. ARGUMENT IN OPPOSITION TO GRANTING CONDITIONAL CROSS WRIT

A. THE COLORADO COURT OF APPEALS CORRECTLY HELD THAT CCIA IS A PUBLIC ENTITY UNDER THE GIA, THE DECISION OF WHICH DOES NOT WARRANT REVIEW BY THIS COURT.

In its Petition for Certiorari, Petitioner CCIA seeks review of the Colorado Supreme Court's decision that it is not an "arm of the state" and therefore a person under 42 U.S.C. § 1983. That decision was based on the court's erroneous analysis of the decisions of this Court and federal appellate courts on what constitutes an arm of the state. Cross Petitioner now argues that the Colorado Courts did not go far enough; that they should have concluded that CCIA is not a "public entity" at all, but a private business. This

argument is not only without merit but in the context of Simons' argument is also not an issue appropriate for certiorari review.

Under Supreme Court Rule 10, a writ of certiorari will only be granted for compelling reasons. While not absolute, 10(b) suggests that such compelling reasons include when "a state court of last resort has decided an important federal question in conflict with the decision of another state court of last resort or of a United States court of appeals" and 10(c) also suggests as compelling when "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Simons do not articulate how the application of governmental immunity to CCIA as a public entity constitutes an important federal question. No United States Constitutional provisions, Amendments, or federal statutes are cited.

The only federal question context in which the Simon's argument would be appropriate for review by this Court is whether CCIA should be categorized as an "arm of the state" entitled to Eleventh Amendment immunity. Simon's citation of *Bank of United States v. Planter's Bank*, 22 U.S. **(9 Wheat.)** 904, 6 L. Ed. 244 (1824) raises the issue of a state's sovereignty under the Eleventh Amendment. Thus, Simons' Argument I is, in reality, further reason for granting Petitioner's Writ rather than the Cross Petition. However, as presented by the Simons, their argument is not appropriate for review by Writ of Certiorari.

Rather than presenting an important Federal question, the Simons essentially ask this court to review the Colorado Appellate Court's interpretation of a state statute which defines a "public entity" as follows:

> . . . the state, county, city and county, municipality [sic], school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation. . . .

Colo. Rev. Stat. § 24-10-103(5)(1887) (*see* App. D for full subsection). In addition to this definition, the state legislature also expressly provided that CCIA is a state agency for the purposes of the GIA and for inclusion in the risk management fund. Colo. Rev. Stat. § 8-45-101(1)(1997). As opposed to liability under the Workers' Compensation Act or CCIA's contracts thereunder, the legislature, by placing it under the state's risk management program, provided that CCIA's tort and federal liability judgments are to be satisfied through the risk management fund. Colo. Rev. Stat. § 24-30-1510(1)(1997). App. H, Petition for Certiorari. Contrary to Simons' statement at page 3 in their Brief In Opposition that "the risk management fund established under sec. 24-30-1510, C.R.S. . . . may not be considered as being a part of the state treasury," that statute states:

> There is hereby created in the state treasury a fund to be known as the risk management fund, which shall consist of all moneys that may be appropriated thereto by the general assembly or that may be otherwise made available to it by the general assembly.

Clearly, the moneys for the risk management fund are from the state treasury.

The case of *Bank of United States v. Planter's Bank*, *supra*, is also clearly distinguishable. In *Bank*, the State of Georgia had simply participated in the incorporation of the

Planter's Bank as a share holder. There was no public purpose served by Georgia's involvement. However, the CCIA is not simply a private insurance company provided special treatment by the State of Colorado. Historically, CCIA is an insurer of last resort, covering employers who could otherwise not be insured through private carriers. For example, certain common carrier drivers, excluded from the Workers' Compensation Act definition of employee, "shall be eligible and shall be offered workers' compensation insurance coverage by the Colorado Compensation Insurance Authority. . . ." Colo. Rev. Stat. § 8-40-301(5) and (6)(1997). It has been the policy of CCIA to provide workers' compensation insurance when no private carrier will. *Bastein v. Martinez*, 698 P.2d 1373 (Colo. App. 1984). *See*, 4 Larson, *Workmens' Compensation Law*, § 92.52 (1990). Only in very limited circumstances will CCIA reject an application for workers' compensation insurance. *Bastien v. Martinez*, 698 P.2d at 1374. CCIA is exposed to greater liability and risk than private insurance carriers which refuse to insure certain members of the public.

Even more significantly, unlike private insurers, CCIA is charged with the duty to provide workers' compensation insurance to the public at cost. Colo. Rev. Stat. § 8-45-106 (1997). Unlike private carriers, CCIA makes no profit on their premiums. CCIA also does not have the option of declaring bankruptcy. It must carry on its statutory mandate and responsibility to the public.

These provisions are clear and unambiguous. Both because of the public purpose and missio- of CCIA and because of the express language of the Colorado Legislature making CCIA a state agency and "public entity" under the GIA, there is no need to review the Colorado Appellate Courts' application of the GIA to Simons' claims against CCIA. The only consideration the Court should give this

issue is that it supports the granting of the writ sought in CCIA's Petition on the issue of whether CCIA is an "arm of the state" and not a "person" under 42 U.S.C. § 1983.

B. COLO. REV. STAT. § 8-45-101 IS CONSTITUTIONAL.

Petitioners cite no compelling reason for review by this Court of this issue. Again no conflicting federal cases are cited. Indeed, Simons rely only on Colorado Court precedents. Their argument that the statute denies them equal protection in violation of the Fourteenth Amendment to the United States Constitution is without merit.

It is unclear why Simons believe that strict scrutiny of this statute should apply. They do not explain this bald statement other than to cite the case of *Tassian v. People*, 731 P.2d 672 (Colo. 1987). Nothing in that decision sheds any light on application of the compelling government interest standard to the facts of this case. That test is reserved for suspect classifications and violation of fundamental constitutional rights. Even if one surmised that Simons' argument for strict scrutiny is that they were denied their day in court by application of the GIA, access to court in circumstances similar to these limitations has not been recognized as a fundamental right entitling one to the strictest level of review under any scenario similar to this case. *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973) (filing fee for bankruptcy petition); *State v. DeFoor*, 824 P.2d 783 (Colo. 1992). The GIA does not infringe upon a fundamental right or create a classification based on race, religion, national origin or gender. *See Fritz v. Regents of University of Colorado*, 196 Colo. 335, 586 P.2d 23, 25 (1978).

The concept of access to court as a fundamental right has been limited to areas of special relationship such as

marriage and divorce. *United States v. Kras*, 409 U.S. 434, 444-445 (1973). Therefore, the GIA must be reviewed under the rational basis test. *Sigman v. Seafood Ltd. Partnership I*, 817 P.2d 527 (Colo. 1991).

Under the rational basis test, the court need only determine whether the classification bears a rational relationship to a permissible governmental purpose. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Simons' argument that they were denied equal protection because of the application of governmental immunity to the CCIA, of which private workers' compensation insurers are not entitled, is no more than to state that the GIA separates victims of private tort-feasors from victims of public tort-feasors. This argument has previously been rejected in Colorado, *State v. DeFoor*, 824 P.2d at 786 n.3. Simons do not identify any other state court of last resort or United States Court of Appeals which is in conflict with Colorado.

In the due process context, this Court has similarly held that liability limitations found in the Price - Anderson Act did not violate the due process guarantee in the Fourteenth Amendment. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978).

As set forth above in Argument A, historically, CCIA is an insurer of last resort, covering employers who could otherwise not be insured through private carriers. It is charged with providing coverage at cost and must carry out the state's mandate where private insurers may abandon their insureds and declare bankruptcy. Thus, CCIA has been given the protection of the GIA, in order for the state to further the important state goal of assuring that all employees will have the protection of workers' compensation insurance.

The purpose of the GIA is to protect the state treasury so that it may accomplish the many needs of

government. Contrary, to Simons' statement at page 14 of their Cross Petition that judgments are to be paid out of the funds allocated to it under Colo. Rev. Stat. § 8-45-102(4), that section only makes the Colorado Compensation Fund (made up of premiums) available for the "payment of losses sustained and liabilities incurred under the contracts or policies of insurance." Thus, such funds are restricted and unavailable for payment of state tort or federal civil rights judgments. Colo. Rev. Stat. § 24-10-113 provides that a public entity shall pay a judgment from (a) funds available from a self-insurance fund; (b) funds not appropriated for any other purpose or unrestricted or (c) funds appropriated for the payment of such judgment which are not previously encumbered. Because, both by provisions in the statute creating CCIA § 8-45-101(1)(1997) and in the Risk Management Act Colo. Rev. Stat. § 24-30-1502(5)(1997), the Colorado Legislature has expressly designated CCIA as a state agency to participate in that self-insurance program payments of judgments against CCIA must be made from the state's self-insurance fund. Clearly, the CCIA needs the GIA protection because its general liability is under the risk management fund which is made up of appropriations by the state, itself. The risk management fund consists of all money which are appropriated or otherwise made available to it by the general assembly. Colo. Rev. Stat. § 24-30-1510 (1997).

These justifications provide a rational basis for the constitutionality of the GIA. There is no compelling reason for this Court to grant Simons' Petition on this issue.

C. THIS COURT SHOULD DENY PLAINTIFFS' CROSS- PETITION REGARDING THE DISMISSAL OF MR. SIMON'S INVASION OF PRIVACY CLAIM BASED ON FEDERAL LAW BECAUSE SIMONS FAILED TO RAISE THE ISSUE BELOW.

A review of the Appendix to CCIA's Petition and Appendices A, B, and C to this Brief In Opposition reveals that Simon never raised the argument that his privacy claim should not be dismissed pursuant to the GIA because it was based on federal law until he petitioned the Colorado Supreme Court. The Colorado Supreme Court will generally not consider a writ of certiorari on an issue which was not presented to the trial court or Court of Appeals. *Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 765 (1992). Likewise, this Court generally will not hear issues which have not been presented below. *Yee v. City of Esc. idido*, 503 U.S. 519, 536, 112 S. Ct. 1522, 1533 (1992) (Court considers questions not raised at the petition stage only in "the most exceptional cases"); *City of Springfield v. Kibbe*, 480 U.S. 257, 258-259 (1987) (dismissing writ as improvidently granted where argument was neither briefed nor argued to the court of appeals nor raised at the petition stage).

Beyond the bald assertions in Simons' complaint and their Petition that CCIA released confidential information which violated Simon's privacy rights, the Simons have never explained this cause of action. The mere conclusory assertion that a federal right has been violated is insufficient to state a cause of action. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). Simon cites no constitutional basis, no case authority, and no specific facts to support this claim. The Simons have not presented any compelling reason for this Court to exercise its supervisory power.

IV. CONCLUSION

The Conditional Cross Petition for Certiorari should be denied for reasons set out above. Simons' first basis does not present a federal question unless viewed as whether CCIA should be granted Eleventh Amendment protection. If so that issue merely supports CCIA's Petition for Certiorari review. The second basis, denial of equal protection or due process is not supported by any federal authority. Clearly, a rational basis exists for the State of Colorado to provide the CCIA protection from unlimited liability under the Colorado Governmental Immunity Act. The third basis should not be reviewed because Simons did not properly preserve the issue in that they failed to present their current argument to the trial court or the Colorado Court of Appeals. Again, Simons cite no federal authority in support of their request. Finally, the Simons fail to present any clear basis for this Court to exercise its jurisdiction such as a clear conflict between the Colorado Supreme Court's decision and decisions of this Court or the decisions of other federal appellate courts.

DATED THIS 7th day of April 1998.

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APPENDIX A

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 93CV1982, Courtroom 8

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

MARK SIMON, CHERYL SIMON and MALACHAI SIMON,

Plaintiffs,

v.

THE STATE OF COMPENSATION INSURANCE AUTHORITY,
THE STATE COMPENSATION INSURANCE FUND, and
THE COLORADO COMPENSATION INSURANCE AUTHORITY,

Defendants.

COMES NOW the Plaintiffs, Mark Simon, Cheryl Simon, and Malachai Simon (hereinafter referred to collectively as "Plaintiffs"), by and through their attorneys of record, Andrew T. Brake, P.C., and for their Brief in Response to Defendants' in Support of Motion to Dismiss state:

INTRODUCTION

The Defendants, The State Compensation Insurance Authority ("SCIA"), The State Compensation Insurance Fund ("SCIF"), and The Colorado Compensation Insurance Authority ("CCIA") (hereinafter collectively referred to as "Defendants") filed a Motion to Dismiss and Brief in Support of Motion to Dismiss the Plaintiffs claims for relief essentially asserting five arguments. Although the Defendants' Brief in Support of Motion to Dismiss is somewhat convoluted, the Defendants are apparently asserting that the Plaintiffs claims should be dismissed for the following reasons:

1. The second through seventh claims for relief are barred by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 *et seq.*, as the Defendants are a political subdivision of the State of Colorado and the Plaintiffs claims lie in tort or could lie in tort;

2. The third claim for relief is specifically barred against public entities;

3. The Plaintiffs' claim for punitive damages is barred by the Colorado Governmental Immunity Act, and in a circular argument, that the punitive damages claims are barred because they are derivative of the claims which are barred by the Colorado Governmental Immunity Act;

4. The Plaintiffs claims must be dismissed for failure to comply with the notice requirements of the Colorado Governmental Immunity Act, including specifically C.R.S. § 24-10-109; and

5. Plaintiffs' claim based upon violation of 42 U.S.C. § 1983 are barred, as the Defendants are not "persons" within the meaning of said statute.

Upon review of the actual facts, and relevant case law, it is apparent that the Defendants arguments should be disregarded. As such, the Plaintiffs' claims are properly before this Court and should be permitted to proceed forward.

STATEMENT OF FACTS

This action arose as a result of the contractual relationship between the Defendants and Plaintiff Mark Simon. Specifically, the Defendants, and each of them, are - were State chartered insurance companies, created pursuant to statute, to provide workmen's compensation insurance to various entities within the State of Colorado in direct competition with various private insurance companies. Plaintiff Mark Simon, along with his partners, applied for and received Workmen's Compensation insurance from SCIF during the year 1982. Plaintiff Mark Simon became a sole proprietor of the business in or about 1984, and notified SCIF that he was the new insured, and the organization was entitled "Mark Simon d/b/a Rocky Mountain General." Plaintiff Mark Simon paid premiums for Workmen's Compensation insurance, including for himself, from 1984 forward, including specifically the premium for the month of January, 1985. On or about January 15, 1985, Plaintiff Mark Simon, while performing duties on behalf of Rocky Mountain General, suffered a pelvic crush injury, and thereafter required substantial medical care. Please see the Plaintiff's First Amended Complaint And Jury Demand, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A".

As a result of said on the job injury, Plaintiff Mark Simon made a claim for insurance benefits with SCIF, which claim was denied. Specifically, SCIF maintained that Plaintiff Mark Simon, as a sole proprietor, was not subject to coverage under the terms of the policy. Plaintiff Mark Simon challenged the decision of SCIF and a hearing was held before Administrative Law Judge Edwin A. Felter, Jr., on or about January 11, 1988, with the sole issue being whether or not Plaintiff Mark Simon was covered by Workmen's Compensation insurance on the date of his injuries through SCIF. In a decision dated November 8, 1988, Judge Felter determined that Plaintiff Mark Simon's injuries were, in fact, covered by the Workman's Compensation Insurance Policy issued to Rocky Mountain General by SCIF. Please see Exhibit "A".

On or about July 1, 1987, SCIA took over the operations of SCIF and was the responsible party for purposes of making payments under Plaintiff Mark Simon's Workmen's Compensation claim. After it was determined that the injury was, in fact, covered, SCIA disputed Plaintiff Mark Simon's entitlement to temporary disability benefits and medical benefits. Plaintiff Mark Simon *again* had to challenge the decision on his entitlement to workmen's compensation insurance benefits pursuant to the policy obtained by Rocky Mountain General from SCIA. In an Order dated July 12, 1989, Administrative Law Judge Felter awarded Plaintiff Mark Simon medical and temporary disability payments. At that time, SCIA appealed both decisions to the Industrial Claims Appeals Panel. On or about March 5, 1990, both of the Administrative Law Judges' Orders were affirmed. Please see Exhibit "A".

On or about April 5, 1990, SCIA filed a General Admission of Liability regarding temporary/total disability. On or about May 14, 1990, Plaintiff Mark Simon, by and through counsel, objected to the admission of liability, and

filed a Motion to Reopen relative to the issue of any offsets to which SCIA may be entitled. On or about August 28, 1990, a hearing was held before Administrative Law Judge Felter on the issue of the offsets to which SCIA was entitled. The determination of the Administrative Law Judge was again in favor of Plaintiff Mark Simon. *Again*, the decision was appealed, and *again*, the determinations on the appeal were in Plaintiff Mark Simon's favor. Please see Exhibit "A".

On or about July 1, 1990, CCIA replaced and otherwise assumed the obligations of SCIA. Plaintiff Mark Simon had also filed a third-party suit regarding his injuries seeking damages. The suit was settled in approximately September, 1988, with the approval of SCIA. The suit and settlement thereof was improperly used as a basis for a claimed offset by SCIA relative thereto. From the date of Plaintiff Mark Simon's claim through September, 1992, more than *seven years* later, the Defendant inexplicably had not made any payments to or on behalf of Plaintiff Mark Simon, despite their obligations and duties pursuant to the terms and conditions of the insurance contract, as well as pursuant to the decisions of the Administrative Law Judge and the Industrial Claims Appeal Panel. Please see Exhibit "A".

Additionally, Plaintiff Mark Simon became involved in the legislative processes that relate to the Workmen's Compensation laws of the State of Colorado. As a result of his involvement, the Defendant released private, confidential and/or false information regarding Plaintiff Mark Simon, contrary to the laws of the State of Colorado and of Federal law, including as advocated by the Defendants, in an attempt to discredit Plaintiff Mark Simon and further deprive him of the benefits to which he was rightfully entitled. Please see Exhibit "A".

As a result of the foregoing willful, wanton, and malicious conduct by the Defendants, Plaintiff Mark Simon's relationship with his wife, Plaintiff Cheryl Simon, and his son, Plaintiff Malachai Simon, were severely damaged. Accordingly, the Plaintiffs filed the instant action asserting seven claims for relief against the Defendants as follows:

1. Violation of 42 U.S.C. § 1983;

2. Bad Faith/Breach of Fiduciary Duty;

3. Outrageous Conduct;

4. Loss of Consortium;

5. Interference with Familial Relations;

6. Invasion of Privacy; and

7. Violation of State and Federal Law.

ARGUMENT

A. STANDARD APPLICABLE TO A MOTION TO DISMISS PURSUANT TO RULE 12, C.R.C.P.

The standard to be applied in determining the Defendants' Motion to Dismiss has long been established in the State of Colorado. Specifically, the Courts have held on numerous occasions that a Motion to Dismiss is viewed with disfavor, and in order to grant same, it must clearly appear that the Plaintiff would not be entitled to relief under any claim supported by the facts plead. *Davidson v. Dill*, 503 P.2d 157, 180 Colo. 123 (1972); *National Sur. Corp. v. Citizens State Bank*, 593 P.2d 362, 41 Colo.App. 580, *affirmed* 612 P.2d 70, 190 Colo. 497, *appeal after remand*

651 P.2d 460, *appeal after remand* 734 P.2d 663; and *Fort v. Holt*, 508 P.2d 792 (Colo.App. 1973).

In making such a determination, all matters well plead in the Complaint must be treated as true. *Abts v. Board of Ed. of School Dist. Re-1 Valley in Logan County*, 622 P.2d 518 (1980); and *Colorado Nat. Bank of Denver v. F.E. Biegert Co., Inc. of Denver*, 438 P.2d 506, 165 Colo. 78 (Colo. 1968). Further, the allegations contained in the Complaint must be viewed in the light most favorable to the Plaintiff, and said allegations must be strictly construed against the Defendant. *Bell v. Aronld*, 487 P.2d 986, 175 Colo. 277 (Colo. 1971); and *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

In applying the foregoing standard to the instant action, it is clear that the Defendants' Motion to Dismiss should be denied.

B. THE COLORADO GOVERNMENTAL IMMUNITY ACT DOES NOT BAR THE PLAINTIFF'S SECOND THROUGH SEVENTH CLAIMS FOR RELIEF.

C.R.S. § 8-45-101, in pertinent part provides:

> There is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for the purposes of the "Colorado Governmental Immunity Act",

> article 10 of title 24, C.R.S., and except for inclusion in the risk management fund and by the division of risk management as provided in part 15 of article 30 of title 24, C.R.S.

A similar provision existed relative to SCIA. The clear implication of the foregoing is that the CCIA and SCIA are subject to the provisions of, the Colorado Governmental Immunity Act. However, it should be noted that the effect of holding the Defendants immune from suit would allow it to disregard laws applicable to insurance companies providing workmen's compensation insurance, which laws are for the benefit and protection of the individual workers of this State.

The workers' compensation laws and laws generally applicable to insurers provide certain guidelines to and/or place certain requirements on insurers relative to the manner in which they are to process claims. In addition, the Courts of this State have imposed additional requirements on insurers in Colorado to protect the individuals who are the beneficiaries of said insurance. In setting forth the basis for imposing said requirements on insurers, the Colorado Supreme Court held:

> Furthermore, once a calamity has befallen an employee covered by worker's compensation or an insured covered under a private insurance contract, the injured party is particularly vulnerable because of the injury or loss. Recognizing that a contract claim for the insurance proceeds may not effectively protect the injured party in such a situation, the Supreme Court of Rhode Island commented as follows: [I]nsurers, backed by sufficient financial resources, are encouraged to

> delay payment of claims to their insureds with an eye towards settling for a lesser amount than that due under the policy . . . the inequity of this situation become particularly apparent in the area of disability insurance in which the insured, often pursued by creditors, and devoid of bargaining power, may easily be persuaded other than that provided for in the insurance contract. *Bibeault v. Hanover Insurance Co.*, 417 A.2d 313, 318 (R.I. 1980); see also *Noble v. National American Life Insurance Co.*, 128 Ariz. 188, 624 P.2d 8667 (1981). See generally *Spencer v. Aetna Life & Casualty Co.*, 227 Kan. 914, 611 P.2d 149 (1980) discussing the court's reasons for adopting bad faith tort. In light of these considerations of insurance generally, and of worker's compensation in particular, we conclude that a claimant of compensation or benefits may bring an action in tort for bad faith by an insurer.

Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1273-1374 (Colo. 1985).

To hold that the Colorado Governmental Immunity Act exculpates the Defendants in this case would send a message that such entities are, for all intents and purposes, not subject to the workers' compensation laws of the State of Colorado and this State's insurance laws generally while holding private insurance companies, the Defendants' competition, responsible for same. Further, such a holding would be contrary to the purpose and intent behind the workers' compensation laws, and would place the

Governmental Immunity Statute in a superior position to other statutes.

The ultimate effect of such a holding would be to treat, unequally, several groups of people depending upon the identity of their insuror. Specifically, individuals insured by a private company would be treated differently than those to whom the CCIA provides workers' compensation insurance coverage. In the case of an employee whose employer purchased workers' compensation insurance coverage from a private insurer, the employee could, pursuant to the laws of the State of Colorado, assert and if proved, recover on a bad faith claim against said entity, while an employee of an employer who has purchased workers' compensation insurance coverage from the CCIA would not be able to assert a claim for bad faith for identical conduct, even though both entities are insurance companies. This fact is best underscored by the fact that the claim of bad faith/breach of fiduciary duty has been recognized relative to adjusters who are not responsible to pay any claim that is submitted. As such, an independent adjustor, adjusting claims on behalf of the Defendants, could potentially be found responsible and/or liable for bad faith conduct and be subject to satisfying such a judgment, while the Defendants would not, even though the independent adjustor and the Defendants may have both engaged in the exact same bad faith conduct. Further, an individual who has been subjected to bad faith conduct by an insurance company, as recognized by the Colorado Supreme Court, is extremely vulnerable and suffers substantial damages in addition to the amounts recoverable under the insurance contract. As the purpose of the Courts is to make Plaintiffs whole who have suffered an injury at the hands of the Defendant, to provide immunity to the Defendants in this case, would be to say that employees who are subjected to bad faith conduct at the hands of the Defendants are not entitled to be made whole, while employees whose insurance is provided by a private

company, such Aetna Insurance Company, would be entitled to be made whole. This is especially inequitable as, in most instances the employee has no control over which insurance company, the Defendants or a private insurance company, will provide workmen's compensation insurance. Such a determination is contrary to the equal protection provisions of the United States Constitution.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It has long been held that the first step in analyzing the foregoing is whether or not the law in question treats similarly situated persons in a like manner, including the Courts of the State of Colorado. *Charlton v. Kimata*, 815 P.2d 946 (Colo. 1991); *Harris v. The Ark*, 810 P.2d 226 (Colo. 1991). After such a determination is made, an objection that a State statute denies a party the equal protection of the laws can only be sustained if the statute treats the party differently from what it does others who are in the same situation as he. *Ohio v. Dollison*, 194 U.S. 447, 24 S.Ct. 703 (1904). In applying the foregoing test to the instant action, it is clear that applying the Colorado

Governmental Immunity Act to one insurer precluding a claim for bad faith and one insured, while requiring all other insurers to be subject to a claim for relief, constitutes disparate treatment of similarly situated individuals and deprives them of the opportunity to be made whole.

Further, no rational basis exists for such a determination, as the Defendants in this case are nothing more than an insurance company and private organizations are permitted to provide the same coverage as the Defendants. Accordingly, the only effect of applying the Colorado Governmental Immunity Act to the Defendants is to deprive the Plaintiffs of the opportunity to be made whole solely on the basis of the selection of an insuror. As such, the application of the Colorado Governmental Immunity Act to the Defendants in this action is contrary to the provisions of the United States Constitution.

It should be noted that this argument relates to the Plaintiffs' Second through Fifth Claims For Relief, as said claims arise out of the bad faith conduct of the Defendants.

It should also be noted that to determine that the Defendants are not liable for their bad faith conduct, and likewise all other similarly situated organizations, would contravene the very basis for the recognition of the claim in the first instance. In *Travelers Ins. Co. v. Savio*, the Colorado Supreme Court recognized that insurers and insureds are on unequal footing, and that insurors often may utilize this unequal position to limit its responsibilities under the terms of the insurance contract, and effectuate a financial gain in their favor. Without the cause of action for bad faith recognized in *Travelers Ins. Co. v. Savio*, public entities, such as the Defendants would be free to engage in bad faith conduct with impunity, thereby determining the fact of any employee's bad faith claim relative to workers' compensation insurance coverage solely based upon who their employer

decided to purchase insurance coverage from, a decision the employee normally has no control over. In fact, to deprive Plaintiffs of a claim based upon governmental immunity would result in disparate treatment to them and to other employees within the State of Colorado. Further, as indicated hereinabove, the purpose and intent behind the workers' compensation act is to provide medical and other benefits to any employee injured on the job, regardless of the manner in which the injury occurred, the purpose being that any injured worker should not be forced to suffer catastrophic loss as a result of an injury. Additionally, the workers' compensation act was enacted to help the injured employee convalesce as quickly as possible, and to enable the employee to return to the work force as quickly as possible. As insurers in the past have engaged in bad faith conduct, thereby necessitating the need for the *Travelers Ins. Co. v. Savio* decision, it is reasonable to assume that such a situation may arise again if public entities such as the Defendants are immune from suit relative to their duties as insurers, and the deterrent effect of *Travelers* would be lost.

Further, with regard to the Plaintiffs' Sixth and Seventh Claims For Relief, those claims are based upon the violation of State and Federal law in the Defendants' dissemination of private, confidential and/or false information about the Plaintiff Mark Simon which occurred relative to the legislature's consideration of the workmen's compensation laws in this State. The Defendants, in taking said action, precludes the Plaintiffs' participation in and/or otherwise effectively denies the Plaintiffs access to the political process. Again, this conduct is unconstitutional, and as such, the Defendants' Motion to Dismiss should be denied.

Finally, the provisions of the Colorado Governmental Immunity Act are inapplicable in this case, as the Plaintiffs' claims have contractual underpinnings in that the claims are

specifically a result of the insurance contract, and Defendants' conduct relative thereto. Claims based upon contract are not subject to the immunities contained in the Colorado Governmental Immunity Act. Accordingly, the provisions of the Colorado Governmental Immunity Act should not be a bar to the Plaintiffs' Claims.

C. THE PROVISIONS OF THE COLORADO GOVERNMENTAL IMMUNITY ACT DO NOT PRECLUDE THE AWARD OF PUNITIVE DAMAGES AGAINST AURORA IN THIS CASE.

As outlined hereinabove, the effect of the Colorado Governmental Immunity Act in this case is to work unconstitutional deprivation of Plaintiffs' right to equal protection of the laws. Accordingly, the provisions of said act are inapplicable in the case where Defendants were acting as an insurer. Due to the inapplicability of the act, any provisions limiting the scope of relief are likewise inapplicable, thereby entitling Plaintiffs to all damages which are otherwise recoverable on their claims. This contention is supported by the provisions of the act itself which indicates that in instances in which the act is inapplicable, the public entity is to be treated as a private individual. C.R.S. § 24-10-107. As such, the Defendants' Motion To Dismiss Plaintiffs' claim to punitive damages should be denied.

The foregoing position is especially true in light of the purpose and intent of punitive damages which is to punish those who engage in egregious, willful and wanton conduct which damages another. In the case of an insurer providing coverage to an employee injured on the job, who is more vulnerable and susceptible to losing everything including their ability to survive, such as Defendants in this case, and the unequal footing of the parties, egregious conduct such as that engaged in by Defendants mandates the award of punitive damages as a deterrent to such behavior in the

future. The importance of such a deterrent is evident by the vast disparity of power between the parties. It should also be noted that other courts have determined that punitive damages are, in some cases, awardable against public entities. See *Cole v. City of Houston*, 442 S.W.2d 445 (Tex.App.-Houston 1987). Accordingly, the claim for punitive damages to Plaintiffs should not be dismissed.

D. DEFENDANTS' ARGUMENTS REGARDING C.R.S. § 24-10-109 ARE NOT FOUNDED UPON THE EVIDENCE IN THIS CASE, AND PLAINTIFFS DID PROPERLY GIVE NOTICE RELATIVE TO THEIR CLAIMS.

Defendants, in their brief, essentially assert that Plaintiffs failed to comply with the notice provisions of C.R.S. § 24-10-109 relative to her claim of breach of the covenant of good faith and fair dealing. Defendants also maintain that actual compliance with the provisions of C.R.S. § 24-10-109 is mandatory, and accordingly, Plaintiffs' claims should be dismissed. Defendants have misrepresented the evidence in this case. In reviewing the actual facts, it is clear that Plaintiffs have properly complied with the provisions of C.R.S. § 24-10-109, to the extent applicable.

As an initial matter, C.R.S, § 24-10-109 falls within the provisions of the Colorado Governmental Immunity Act. As outlined hereinabove, the Colorado Governmental Immunity Act is inapplicable, and as such, no notice was required. In any event, the evidence is clear that Plaintiffs did, in fact, give timely notice to Defendants of their claims in accordance with the provisions of C.R.S. § 24-10-109. The referenced statute specifically provides:

> (1) Any person claiming to have suffered an injury by a public entity or by an

> employee thereof while in the course of such employment shall file a written notice as provided in this section within one hundred eighty days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.

In interpreting this statute, the Colorado Supreme Court has held:

> . . . On the contrary, we believe that these interests can best be accommodated by interpreting the term "compliance" in the 1986 version of section 24-10-109(1) as requiring nothing less than, nor more than, "substantial compliance."
>
> Substantial compliance requires a claimant, within 180 days of *the discovery* of an injury, to file a written notice with the public entity and to make a good faith effort to include within the notice, to the extent the claimant is reasonably able to do so, each item of information listed in section 24-10-109(2). In determining whether a claimant has substantially complied with the notice requirement, a court may consider whether and to what extent the public entity has been adversely affected in its ability to defend against the

claim by reason of any omission or error in the notice.

Woodsmall v. Regional Transp. Dist., 800 P.2d 63, 69 (Colo. 1990). In *Miller v. Armstrong World Industries*, 817 P.2d 111, 113 (Colo. 1991), the Colorado Supreme Court determined that a cause of action for injury to a person accrues on the date both the injury and its cause are known or should have been known. While the *Miller* decision did not directly deal with the notice provisions of the Colorado Governmental Immunity Act, when read in conjunction with the *Woodsmall* decision, it provides substantial guidance. Specifically, an individual has not "discovered" an injury, thereby invoking the 180 day notice period until such time as said individual knows of the injury and cause, although all of the elements need not be known. Such is the standard that should be applied in the instant action.

The Plaintiffs have filed three notices in this particular case, the first notice on or about August 29, 1990, the second notice on or about June 12, 1991, and the third notice on or about December 10, 1992. Copies of the referenced letters are attached hereto and incorporated herein by reference as Exhibits "B", "C", and "D", respectively. The wrongful conduct of the Defendants was not learned of immediately, and upon determining that the Defendants had engaged in such conduct, the Plaintiffs timely gave notice. Further, as the Defendants' wrongful conduct has been ongoing, the additional notices were given. All of the notices were well within the time frames referenced by the statute. Please see *Morrison v. City of Aurora*, 745 P.2d 1042 (Colo.App. 1987); and *Dominguez v. Babcock*, 696 P.2d 338, *affirmed* 727 P.2d 362 (Colo.App. 1984).

Pursuant to the *Woodsmall* and *Miller* decisions, it is clear that Plaintiffs complied with C.R.S. § 24-10-109, as

Defendants' ability to defend were not compromised, nor was its ability to investigate and remedy its conduct, especially in light of Defendants' ...ntial contin... bad faith conduct which commenced ... or about ... and continues through the present. A...rdingly, De...ants' contentions are without merit and should be disrega...d.

E. PLAINTIFFS' CLAIM FOR OUTRAGEOUS CONDUCT IS NOT BARRED.

The Defendants, in relying upon *Belfiore v. Dept. Of Highways*, 847 P.2d 244 (Colo. App. 1993), maintain that a claim for outrageous conduct may not be asserted against the Defendants. The *Belfiore* decision and the determination that damages for outrageous conduct could not be asserted against a public entity were based upon the provisions of C.R.S., § 24-10-114(4).

This position, as outlined hereinabove, is unmeritorious. Specifically, the provisions of the Colorado Governmental Immunity Act are unconstitutional as applied to the Defendants. As such, the provisions of C.R.S., § 24-10-114(4) are not applicable to this case, and said statute and the *Belfiore* decision cannot preclude such a claim.

F. PLAINTIFFS HAVE PROPERLY ASSERTED A CLAIM FOR RELIEF BASED UPON 42 U.S.C. § 1983.

The Defendants contend that they, as state agencies, are not "persons" within the meaning of 42 U.S.C. § 1983. However, said contention is unmeritorious in light of the actual facts. In reality, the Defendants are not agencies of state government, but are, in fact, a state "corporation".

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It has been determined that corporations are "persons" for purposes of bringing suit under 42 U.S.C. § 1983. *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 490 F.Supp. 800 (D.C. Puerto Rico 1975), aff'd. 553 F.2d 701; and *Ozlu v. Lock Haven Hospital*, 368 F.Supp. 283 (D.C. Pa. 1973). As such, the Defendants are "persons" within the meaning of the statute, and Plaintiffs have properly stated a claim against the Defendants for violation of 42 U.S.C. § 1983. Therefore, the Defendants' Motion to Dismiss Plaintiffs' 42 U.S.C. § 1983 claim should be denied.

CONCLUSION

For the reasons outlined hereinabove, the Plaintiff has properly asserted claims for relief against the named Defendants, and the Defendants' Motion To Dismiss should be denied. Specifically, the Colorado Governmental Immunity Act is inapplicable to the Plaintiffs' claims and all such claims, including Plaintiffs' claim for punitive damages should be allowed to proceed forward. Further, Plaintiffs have properly stated a claim under 42 U.S.C. § 1983 as the Defendants are "persons" within the meaning of said statute.

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order denying the Defendants' Motion To Dismiss. Additionally, Plaintiff requests such other and further relief as this Court deems just and proper.

PLAINTIFFS REQUEST A HEARING AT WHICH TIME ORAL ARGUMENT MAY BE MADE ON THE FOREGOING ISSUES.

DATED this 22nd day of July, 1993.

Respectfully submitted,

ANDREW T. BRAKE, P.C.

By /s/ Lee Judd
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 1993, true and correct copies of the above and foregoing PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS was deposited in the United States mail, postage prepaid, addressed to the following:

George S. Meyer, Esq.
Assistant Attorney General
Tort Litigation Section
1525 Sherman Street, Fifth Floor
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Mark Simon
Cheryl Simon
Malachai Simon
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/s/ Dorie Edwards

APPENDIX B

COLORADO COURT OF APPEALS, STATE OF COLORADO

Case No. 93CA2211

OPENING BRIEF OF PLAINTIFFS-APPELLANTS MARK SIMON, CHERYL SIMON AND MALACHAI SIMON

MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,

Plaintiffs-Appellants,

vs.

THE STATE COMPENSATION INSURANCE AUTHORITY, THE STATE COMPENSATION INSURANCE FUND, and THE COLORADO COMPENSATION INSURANCE AUTHORITY,

Defendants-Appellees.

Appeal from the Honorable Larry J. Naves
Denver County District Court, Courtroom 8
Civil Action No. 93-CV-1982

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COMES NOW the Plaintiffs-Appellants Mark Simon ("Mr. Simon"), Cheryl Simon, and Malachai Simon (hereinafter referred to collectively as "Plaintiffs"), by and through their attorneys of record, Andrew T. Brake, P.C., and for their opening brief states:

STATEMENT OF ISSUES PRESENTED

A. Whether the Trial Court erred in granting Defendants-Appellants The State Compensation Insurance Authority's ("SCIA"), The State Compensation Insurance Fund's ("SCIF"), and The Colorado Compensation Insurance Authority's ("CCIA") (hereinafter collectively referred to as "Defendants") Motion to Dismiss and in denying Plaintiffs' Motion to Reconsider the Court's Order Dated September 27, 1993, and Brief in Support Thereof.

II.
STATEMENT OF THE CASE

This action arose as a result of the conduct of the Defendants in administering, processing, and/or handling Mr. Simon's worker's compensation claims. Specifically, Mr. Simon suffered a pelvic crush injury in the course of his employment on or about January 15, 1985. Thereafter, on a continuing basis, each of the Defendants, at various times, refused to pay and/or provide the benefits which they were contractually obligated to provide, and which were ordered by the Administrative Law Judge who heard the case on behalf of the Worker's Compensation Division, and the Industrial Claims Appeals panel. In fact, the Defendants inexplicably refused to make any payments or provide any benefits to Mr. Simon in any fashion until in or about September, 1992.

Mr. Simon also became involved in the legislative process relative to the worker's compensation laws of the State of Colorado. As a result of Mr. Simon's involvement, the Defendants released private, confidential and/or false information regarding Mr. Simon, contrary to the laws of the State of Colorado and of federal law, in an attempt to discredit Mr. Simon and further deprive him of the benefits to which he was entitled. As a result of the Defendants' conduct, the Plaintiffs, and each of them suffered substantial harm and damage.

The Plaintiffs provided the requisite notice pursuant to C.R.S. § 24-10-109, and ultimately commenced Civil Action No. 93 CV 1982 in the District Court, City and County of Denver, State of Colorado alleging seven (7) claims for relief. The Defendants filed a motion to dismiss maintaining that all of the Plaintiffs' claims, with the exception of their violation of 42 U.S.C. § 1983 claim, were barred by the Colorado Governmental Immunity Act ("CGIA"), C.R.S. § § 24-10-101 *et seq.*, and that the claimed violation of 42 U.S.C. § 1983 was barred as the Defendants are not "persons" within the meaning of the statute. Additionally, the Defendants maintained that the Plaintiffs' claim for punitive damages was barred by the CGIA.

The Trial Court, in an Order dated September 27, 1993, granted the Defendants' Motion to Dismiss, finding that the Plaintiffs' state law claims were barred by the CGIA, and that the Plaintiffs' 42 U.S.C. § 1983 claim was barred because the Defendants are not "persons" within the meaning of the referenced statute. The Plaintiffs filed a Motion to Reconsider the Court's Order Dated September 27, 1993, and Brief in Support Thereof, essentially maintaining that the constitutionality of the CGIA, as applied to the facts of this case, had never before been addressed, that the CGIA was unconstitutional, and that Plaintiffs' 42 U.S.C. § 1983 claim was properly asserted. The Trial Court, in an Order dated

December 2, 1993, denied the Plaintiff's Motion to Reconsider the Court's Order Dated September 27, 1993, and Brief in Support Thereof. Thereafter, the Plaintiffs commenced the instant appeal.

III.
STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

This action arose as a result of the contractual relationship between the Defendants and Mr. Simon. Specifically, the Defendants, and each of them, are or were State chartered insurance companies, created pursuant to statute, to provide workmen's compensation insurance to various entities within the State of Colorado in direct competition with various private insurance companies. Mr. Simon, along with his partners, applied for and received Worker's Compensation insurance from SCIF during the year 1982. Mr. Simon became a sole proprietor of the business in or about 1984, and notified SCIF that he was the new insured, and the organization was entitled "Mark Simon d/b/a Rocky Mountain General." Mr. Simon paid premiums for Worker's Compensation insurance, including for himself, from 1984 forward, including specifically the premium for the month of January, 1985. On or about January 15, 1985, Plaintiff Mark Simon, while performing duties on behalf of Rocky Mountain General, suffered a pelvic crush injury, and thereafter required substantial medical care. Tr. Rec. P. 9 through 15.[1]

As a result of said on the job injury, Mr. Simon made a claim for insurance benefits with SCIF, which claim was

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[1] Tr. Rec. refers to the Record on Appeal in Civil Action No. 93 CV 1982 in the District Court, City and County of Denver, State of Colorado.

denied. Specifically, SCIF maintained that Mr. Simon, as a sole proprietor, was not subject to coverage under the terms of the policy. Mr. Simon challenged the decision of SCIF and a hearing was held before Administrative Law Judge Edwin A. Felter, Jr., on or about January 11, 1988, with the sole issue being whether or not Plaintiff Mark Simon was covered by Worker's Compensation insurance on the date of his injuries through SCIF. In a decision dated November 8, 1988, Judge Felter determined that Plaintiff Mark Simon's injuries were, in fact, covered by the Workman's Compensation Insurance Policy issued to Rocky Mountain General by SCIF. Tr. Rec. P. 9 through 15.

On or about July 1, 1987, SCIA took over the operations of SCIF and was the responsible party for purposes of making payments under Mr. Simon's Worker's Compensation claim. After it was determined that the injury was, in fact, covered, SCIA disputed Mr. Simon's entitlement to temporary disability benefits and medical benefits. Mr. Simon *again* had to challenge the decision on his entitlement to workmen's compensation insurance benefits pursuant to the policy obtained by Rocky Mountain General from SCIA. In an Order dated July 12, 1989, Administrative Law Judge Felter awarded Mr. Simon medical and temporary disability payments. At that time, SCIA appealed both decisions to the Industrial Claims Appeals Panel. On or about March 5, 1990, both of the Administrative Law Judges' Orders were affirmed. Tr. Rec. P. 9 through 15.

On or about April 5, 1990, SCIA filed a General Admission of Liability regarding temporary/total disability. On or about May 14, 1990, Mr. Simon, by and through counsel, objected to the admission of liability, and filed a Motion to Reopen relative to the issue of any offsets to which SCIA may be entitled. On or about August 28, 1990, a hearing was held before Administrative Law Judge Felter

on the issue of the offsets to which SCIA was entitled. The determination of the Administrative Law Judge was again in favor of Mr. Simon. *Again*, the decision was appealed, and *again*, the determinations on the appeal were in Mr. Simon's favor. Tr. Rec. P. 9 through 15.

On or about July 1, 1990, CCIA replaced and otherwise assumed the obligations of SCIA. Mr. Simon had also filed a third-party suit regarding his injuries seeking damages. The suit was settled in approximately September, 1988, with the approval of SCIA. The suit and settlement thereof was improperly used as a basis for a claimed offset by SCIA relative thereto. From the date of Mr. Simon's claim through September, 1992, more than *seven years* later, the Defendant inexplicably had not made any payments to or on behalf of Mr. Simon, despite their obligations and duties pursuant to the terms and conditions of the insurance contract, as well as pursuant to the decisions of the Administrative Law Judge and the Industrial Claims Appeal Panel. Tr. Rec. P. 9 through 15.

Additionally, Mr. Simon became involved in the legislative processes that relate to the Worker's Compensation laws of the State of Colorado. As a result of his involvement, the Defendant released private, confidential and/or false information regarding Mr. Simon, contrary to the laws of the State of Colorado and of federal law, including as advocated by the Defendants, in an attempt to discredit Mr. Simon and further deprive him of the benefits to which he was rightfully entitled. Tr. Rec. P. 9 through 15.

As a result of the foregoing willful, wanton, and malicious conduct by the Defendants, Mr. Simon's relationship with his wife and his son were severely

damaged. Accordingly, the Plaintiffs filed the instant action asserting seven claims against the Defendants as follows:

1. Violation of 42 U.S.C. § 1983;
2. Bad Faith/Breach of Fiduciary Duty;
3. Outrageous Conduct;
4. Loss of Consortium;
5. Interference with Familial Relations;
6. Invasion of Privacy; and
7. Violation of State and Federal Law.

Tr. Rec. P. 9 through 15.

IV.
SUMMARY OF ARGUMENT

The Plaintiffs' state law claims are *not* barred by the CGIA, as it is unconstitutional for a variety of reasons. It should be noted that the constitutionality of the CGIA as applied to the facts of this case is one of first impression in this State.

A strict scrutiny standard applies, because under the facts of this case, the Plaintiffs' fundamental rights as guaranteed by Article II § 6 of the Colorado Constitution have been violated. Specifically, the Plaintiffs are being barred access to the Courts of Justice to remedy injuries suffered, and the Defendants cannot establish any compelling governmental interest relative to the CGIA under the facts of this case.

Dismissal of the Plaintiffs' State law claims is violative of the due process guarantee. The Plaintiffs have a property interest in their claims against the Defendants, including as recognized by the bankruptcy laws, which has been deprived by the application of the CGIA to nothing more than an

insurance company. This denial is further in contravention of Article II § 6 of the Colorado Constitution.

Even assuming the strict scrutiny standard referenced hereinabove is inapplicable, the CGIA under the facts of this case is violative of the equal protection of the laws. The Plaintiffs are being treated disparately solely upon the selection of a worker's compensation insurer, which normally the injured employee has no control over. This disparity was underscored in *Jordan v. City of Aurora and GAB Business Services, Inc.* 92 CA 1632 (Colo.App. 1993), wherein a self-insured governmental entity was protected from a bad faith claim based upon the handling of a worker's compensation claim while a private adjusting firm was not, even though the conduct complained of was the same. This disparity of treatment is not real, but illusory, and the Defendants cannot establish any rational basis for treatment and/or protection which is different from that applied to insurance companies like State Farm Insurance, and insureds like the Plaintiffs.

The Defendants are "persons" within the meaning of 42 U.S.C. § 1983, as they are a corporation which, although a subdivision of the State, are not subject to authority or direction by the State, are not dependent on the State for resources, have the ability to sue or be sued, and have the authority to enter into contracts.

V.
ARGUMENT

A. APPLICABLE STANDARD OF LAW.

The standard to be applied in determining a Motion to Dismiss has long been established in the State of Colorado. Specifically, the Courts have held on numerous occasions that a Motion to Dismiss is viewed with disfavor, and in

order to grant same, it must clearly appear that the Plaintiff would not be entitled to relief under any claim supported by the facts plead. *Davidson v. Dill*, 503 P.2d 157, 180 Colo. 123 (1972); *National Sur. Corp. v. Citizens State Bank*, 593 P.2d 362, 41 Colo.App. 580, *affirmed* 612 P.2d 70, 190 Colo. 497, *appeal after remand* 651 P.2d 460, *appeal after remand* 734 P.2d 663; and *Fort v. Holt*, 508 P.2d 792 (Colo.App.1973).

In making such a determination, all matters well plead in the Complaint must be treated as true. *Abts v. Board of Ed. of School Dist. Re-1 Valley in Logan County*, 622 P.2d 518 (1980); and *Colorado Nat. Bank of Denver v. F.E. Biegert Co., Inc. of Denver*, 438 P.2d 506, 165 Colo. 78 (Colo. 1968). Further, the allegations contained in the Complaint must be viewed in the light most favorable to the Plaintiff, and said allegations must be strictly construed against the Defendant. *Bell v. Arnold*, 487 P.2d 986, 175 Colo. 277 (Colo. 1971); and *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). This Court, in reviewing this matter, applies the same standard.

In applying the foregoing standard to the instant action, it is clear that the Defendants' Motion to Dismiss should have been denied, and in any event, Plaintiffs' motion to reconsider should have been granted.

B. THE COLORADO GOVERNMENTAL IMMUNITY ACT, AS APPLIED TO THE PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF IS UNCONSTITUTIONAL.

C.R.S. § 8-45-101, in pertinent part provides:

> There is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for the purposes of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., and except for inclusion in the risk management fund and by the division of risk management as provided in part 15 of article 30 of title 24, C.R.S.

The question presented in the instant action is the constitutionality of the CGIA as it applies to claims commenced against the Defendants. Upon Plaintiffs' research of this issue, the constitutionality of the CGIA as applied to any of the Defendants has never before been addressed by the Courts of this State. While the constitutionality of various portions of the CGIA have been made relative to other factual circumstances, such a determination in the present factual situation appears to be one of first impression. Upon close examination of the current factual situation, it is apparent that the application of the CGIA to the Defendants is violative of Article II, § 6 of the Colorado Constitution because it denies the Plaintiffs equal protection of the laws and further violates the Plaintiffs' rights to due process.

1. APPLICATION OF THE COLORADO GOVERNMENTAL IMMUNITY ACT TO THE PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF IS VIOLATIVE OF ARTICLE II, § 6 OF THE COLORADO CONSTITUTION.

In discussing the standard to be applicable to a claim that equal protection of the laws requires that a statute be declared unconstitutional, the Colorado Supreme Court in *Tassian v. People*, 731 P.2d 672 (Colo. 1987) held:

> . . . When the classification creates a suspect class, such as one based on race or national origin, *or interferes with the exercise of a fundamental right, such as the right of free speech or religion*, a standard of strict judicial scrutiny must be applied in resolving an equal protection challenge. The government in such a case must establish that the statutory classification is necessarily related to a compelling governmental interest. . . . (Emphasis added).

Id. 675.

Article II, § 6, of the Colorado Constitution provides:

> Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

To determine that the Plaintiffs' second through seventh claims for relief are barred by the CGIA would be to deprive the Plaintiffs of a fundamental right as guaranteed by the

Colorado Constitution (i.e. access to the Courts of Justice to remedy injuries suffered). As such, the Defendants must establish a compelling governmental interest is necessarily related to the statute which provides that they are subject to the CGIA, and the Defendants are immune from the Plaintiffs' second through seventh claims for relief. No such compelling governmental interest exists.

Specifically, the Defendants, and each of them, are or were State chartered insurance companies, created pursuant to statute, to provide workmen's compensation insurance to various entities within the State of Colorado in direct competition with various private insurance companies. Further, the Defendants are not agencies of the State, nor are they subject to administrative direction by the State. Finally, the Defendants determine premiums, write insurance policies, and pay claims like any other insurance carrier.

The Defendants should be treated like any other corporation, as the provision of insurance, such as that provided by numerous *private* insurance carriers, is not an essential governmental service or function. Furthermore, to hold that the CGIA exculpates the Defendants in this case would send a message that such entities are not subject to the workers' compensation laws of the State of Colorado and this State's insurance laws generally while holding private insurance companies, the Defendants' competition, responsible for same. The ultimate effect of such a holding would be to treat several groups of people unequally, including the Plaintiffs, depending upon the identity of their insurer.

As the Defendants' can point to no compelling governmental interest in this case, the only logical determination which can be made is that the CGIA is unconstitutional as applied to the Plaintiffs' second through

seventh claim for relief, and Plaintiffs' claims should be reinstated.

2. DISMISSAL OF THE PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF IS VIOLATIVE OF THE DUE PROCESS GUARANTEE.

In *State v. DeFoor*, 824 P.2d 783 (Colo. 1992), the Colorado Supreme Court held:

> The due process guarantee of the Colorado Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." Colo. Const., art. II, § 25. . . . Claimants rely on *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944), for the proposition that the right to damages for injuries constitutes property subject to the protections of the due process guarantee. The plaintiff in *Rosane* contested whether the district court erred in finding that her medical malpractice action was barred by a statute of limitations. We said that "[a] legal right to damage for an injury is property and one can not [sic] be deprived of his property without due process. There can be no due process unless the party deprived has his day in court." *Id.* at 370, 149 P.2d at 375. . . .

Id. at 792.

While the *DeFoor* decision went on to determine that the claimants in that case failed to identify a property interest, said determination was based upon the fact that a *limited* remedy was provided. That is not this case. In this case, the Plaintiffs are being deprived of their property interest in

their claim. This position is bolstered by the body of law which makes up the bankruptcy laws and which require that a debtor list all property in their petition, including claims such as those dismissed in the instant action, as part of the debtor's estate. Further, to deny the Plaintiffs due process of law would likewise be contrary to the provisions of Article II, § 6 of the Colorado Constitution as identified hereinabove.

As such a denial of due process is not permissible, especially under the circumstances of this case in which the Defendants are nothing more than insurance companies. Accordingly, Plaintiffs second through seventh claims for relief should be reinstated, and a determination made that the CGIA is violative of the Plaintiffs' due process rights as applied to the Defendants.

3. THE COLORADO GOVERNMENTAL IMMUNITY ACT, AS APPLIED TO THE PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF, ARE VIOLATIVE OF THE EQUAL PROTECTION OF THE LAWS.

Assuming arguendo that the strict scrutiny standard referenced hereinabove is inapplicable to the equal protection arguments to be employed in this case, it was still a violation of equal protection of the laws to dismiss the Plaintiffs' second through seventh claims for relief. Specifically, in *Tassian v. People*, 731 P.2d 672 (Colo. 1987), the Colorado Supreme Court held:

> Equal protection of the laws requires that the government treat similarly situated persons in a similar manner. A distinction between classes or groups of people, whether created by a statute or rule, must have some relevance to the purpose for which the classification is made. . . .

> In the absence of a suspect class, a fundamental right, or a classification triggering an intermediate standard of scrutiny, a rational basis standard of review is applicable. While equal protection of the laws does not demand that a statute or rule necessarily applies equally to all persons, it does require, under rational basis analysis, that a governmental classification which singles out a group of persons for disparate treatment be rationally founded on differences that are real and not illusory and that such classification be reasonably related to a legitimate state interest. . .

Id. at 675.

In the instant action, the disparate treatment asserted by the Defendants is in fact not real, but rather illusory. Further no legitimate state interest can be proffered. The only difference between the Plaintiffs in this case, and Plaintiffs who can unquestionably assert claims similar to those maintained by the Plaintiffs in this case, is the *insurer chosen*. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1273-1274 (Colo. 1985). Under these circumstances, no real distinction can therefor be maintained. Further, the Defendants participation in the insurance industry like any private insurer does not further the provision of essential services or performance of essential functions. Accordingly, to preclude the Plaintiffs from asserting their second through seven claims for relief would be to deprive them of the equal protection of the laws.

Specifically, individuals insured for worker's compensation purposes by an insurance company such as State Farm Insurance would be treated differently than those whom the CCIA provides the same coverage. In the case of an employee whose employer purchased workers'

compensation insurance coverage from a private insurer, the employee could, pursuant to the laws of the State of Colorado, assert and if proved, recover on a bad faith claim against said entity, while an employee of an employer who has purchased workers' compensation insurance coverage from the CCIA would not be able to assert a claim for bad faith for identical conduct, even though both entities are insurance companies. This fact is best underscored by the fact that the claim of bad faith/breach of fiduciary duty has been recognized relative to adjusters who are not responsible to pay any claim that is submitted. *Johnson v. Scott Wetzel Services. Inc.*, 797 P.2d 786 (Colo.App. 1990). As such, an independent adjustor, adjusting claims on behalf of the Defendants, could be found responsible and/or liable for bad faith conduct and be subject to satisfying such a judgment, while the Defendants would not, even though the independent adjustor and the Defendants may have both engaged in the exact same bad faith conduct. This circumstance was specifically recognized in *Jordan v. City of Aurora and GAB Business Services. Inc.*, 92 CA 1632 (Colo.App. 1993), a copy of which is attached hereto and incorporated herein by reference as Exhibit "A", in which this Court held:

> Here, GAB stood in the shoes of Aurora in processing plaintiff's claim, and we hold that the decision announced in *Savio* sufficiently foreshadowed a good faith duty imposed on insurance carriers as well as their agents. Thus, plaintiff should have been permitted to reassert her bad faith claim against GAB.

Id. at 11. This decision further overturned a jury verdict against Aurora as a self insured for worker's compensation purposes as a result of CGIA immunity for a bad faith claim.

Further, an individual who has been subjected to bad faith conduct by an insurance company, as recognized by the Colorado Supreme Court, is extremely vulnerable and suffers substantial damages in addition to the amounts recoverable under the insurance contract. As the purpose of the Courts is to make Plaintiffs whole who have suffered an injury at the hands of the Defendant, to provide immunity to the Defendants in this case, would be to say that employees who are subjected to bad faith conduct at the hands of the Defendants are not entitled to be made whole, while employees whose insurance is provided by a private company, such State Farm Insurance Company, would be entitled to be made whole. This is especially inequitable as, in most instances the employee has no control over which insurance company will provide workmen's compensation insurance. Such a determination is contrary to the equal protection provisions of the United States Constitution and the Colorado Constitution.

It should likewise be noted that while generally certain portions of the CGIA have been determined to be constitutional in light of the facts presented, the issues presented in this case are of first impression and no determination has been made that the CGIA is applicable to claims commenced against the Defendants. It should also be noted that application of the CGIA to the Defendants is contrary to Article V, § 25 of the Colorado Constitution. Specifically, Article V, § 25, in pertinent part, provides:

> The general assembly shall not pass local or special laws in any of the following enumerated cases, . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatsoever. . . .

As the Defendants by statute are a corporation, and in reality are nothing more than an insurance company, to grant them

immunity as outlined in C.R.S. § 8-45-101 is violative of the Colorado Constitution and the United States Constitution. As such, the Plaintiffs' second through seventh claims for relief should be reinstated and allowed to proceed forward.

C. THE PLAINTIFFS HAVE PROPERLY ASSERTED A CLAIM PURSUANT TO 42 U.S.C. § 1983.

The Trial Court, in its Order dated September 27, 1993, on the propriety of Plaintiffs' 42 U.S.C. § 1983 claim held:

> 4. The plaintiffs' claim based upon 42 U.S.C. § 1983 is dismissed because the defendants are not 'persons' within the meaning of 42 U.S.C. § 1983. Here, the defendants are equivalent to the state. The defendants are not dependent entirely on the state for funds and resources to respond to a suit for damages-clearly and 'arm of the state.' *Wigger v. McKee*, 809 P.2d 999, (Colo. App. 1990). *Will v. Michigan Department Of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

As such, the issue to be determined in this case is whether or meaning of not the Defendants are "persons" within the meaning of 42 U.S. C. § 1983. In *Wigger v. McKee*, 809 P.2d 999, (Colo. App. 1990), this Court held:

> Hence *Will* excludes from § 1983 coverage only the 'states or governmental entities that are considered 'arms of the state' for eleventh amendment purposes.' *Will v. Michigan Department Of Social Services*, *supra*.
>
> Whether a governmental entity is an 'arm of the state' is determined by balancing the entity's

independent powers with those entirely dependent on the state. See *Mount Healthy City Board of Education v. Doyle*. 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

If the entity is the state's alter ego, dependent entirely on the state for the funds and resources to respond to a suit for damages, it is equivalent to the state. (Citations omitted.)

On the other hand, counties and municipal corporations that are defined as 'bodies corporate and politic' and have even limited power to sue and be sued in their own names are not the state for purposes of the eleventh amendment, even though they are political subdivisions of the state. See *Mount Healthy City Board Of Education v. Doyle*, *supra*; *Moor v. County of Alameda*, *supra*; *Mosier v. Robinson*, 722 F.Supp. 555 (W.D. Ark. 1989); See also *Will v. Department Of State Police*, *supra* (at time § 1983 was enacted, the term 'body politic' was most appropriately applied to a public corporation, which included, towns, cities and counties, but not states').

In Colorado, a county is defined as 'a body corporate and politic' and has the power to sue and be sued, to enter into contracts, and to level certain taxes. § 30-11-101, C.R.S. (1986 Repl. Vol. 12A). Therefore, it is not the alter ego of the state for eleventh amendment purposes and is a 'person' under 42 U.S.C. § 1983. . . . Such holdings involve neither the eleventh amendment nor 42 U.S.C. § 1983 and the United States Supreme Court has noted that it has 'consistently refused to construe the amendment to afford political

> protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power'.' *Lake County Estates. Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979).

Id. at 1003.

In applying the foregoing to the instant action, it is abundantly clear that the Defendants are "persons" within the meaning of 42 U.S.C. § 1983. Specifically, as cited hereinabove, C.R.S. § 8-45-101(1), in pertinent part provides:

> *There is hereby created the Colorado Compensation Insurance Authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government. nor shall it be subject to administrative direction by any state agency. . .*

This statutory statement indicates that although a political subdivision of the state, it is not subject to the authority or direction of state government. Further, the Defendants are not dependent upon the resources of the state in its operations, but rather does so based upon premiums collected such as any other private insurance carrier. Furthermore, the Defendants have the power to sue and be sued, and to enter into contracts, such as insurance policies. In determining the balance of independent powers with those entirely dependent upon the state, it is apparent that virtually none of the Defendants' powers are entirely dependent on the state. As such, the Defendants are "persons" within the meaning of 42 U.S.C. § 1983, and Plaintiffs' claim against

the Defendants for violation of 42 U.S.C. § 1983 should be reinstated against the Defendants.

VI.
CONCLUSION

For the reasons outlined hereinabove, including that the CGIA, as applied to the Defendants in this situation is unconstitutional, and that the Defendants are "persons" within the meaning of 42 U.S.C. § 1983, the Plaintiffs' claims should be reinstated, the Court's September 27, 1993 Order vacated, and a determination rendered that the CGIA is unconstitutional as applied under the facts of this specific case. Additionally, Plaintiffs request such other and further relief as is deemed just and proper.

DATED this 7th day of May, 1994.

Respectfully submitted,

ANDREW T. BRAKE, P. C.

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CERTIFICATE OF MAILING

I hereby certify that on this 9th day of May, 1994, true and correct copies of the above and foregoing **OPENING BRIEF OF PLAINTIFFS-APPELLANTS MARK SIMON, CHERYL SIMON, AND MALACHAI**

SIMON were placed in the United States mail, postage prepaid, addressed to the following:

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SIMON.APP/TTHD

APPENDIX C

COLORADO COURT OF APPEALS, STATE OF COLORADO

Case No. 93CA2211

REPLY BRIEF OF PLAINTIFFS-APPELLANTS MARK SIMON, CHERYL SIMON AND MALACHAI SIMON

MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,

Plaintiffs-Appellants,

vs.

THE STATE COMPENSATION INSURANCE AUTHORITY, THE STATE COMPENSATION INSURANCE FUND, and THE COLORADO COMPENSATION INSURANCE AUTHORITY,

Defendants-Appellees.

Appeal from the Honorable Larry J. Naves
Denver County District Court, Courtroom 8
Civil Action No. 93-CV-1982

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COMES NOW the Plaintiffs-Appellants Mark Simon ("Mr. Simon"), Cheryl Simon, and Malachai Simon (hereinafter referred to collectively as "Plaintiffs"), by and through their attorneys of record, Andrew T. Brake, P.C., and for their reply brief states:

I.
INTRODUCTION

Defendants-Appellees The State Compensation Insurance Authority, The State Compensation Insurance Fund, and The Colorado Compensation Insurance Authority (hereinafter referred to as "Defendants") engage in a lengthy discussion of their position in which the applicable standards to be applied in this case are discussed, as well as the manner in which the Defendants operate. However, the assertions made by the Defendants are not supported, and appear to be an attempt to confuse the real issues in this case. The inescapable conclusion in this case is that the Plaintiffs' claims were improperly dismissed, and that the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 *et seq.* (hereinafter referred to as "CGIA"), is unconstitutional as applied to the Defendants.

Specifically, the Defendants assert that rather than a strict scrutiny standard, a reasonableness standard must be applied in determining whether or not the CGIA is unconstitutional as applied to the Defendants. Further, the Defendants assert that any reasonable basis, whether actually considered or not, will support the constitutionality of the statute, and that because the Defendants are insurers of last resort, are to provide insurance at the lowest possible cost, and are subject to the provisions of the risk management fund for payment of judgments and/or defense costs, it is legitimate to believe that the legislature, for fiscal planning purposes, felt it

appropriate to limit the Defendants liability. This position is not supported by the reality of the situation.

With regard to Plaintiffs' equal protection argument, the Defendants maintain that tort recovery can be limited, and the fact that different people are treated differently does not render an act unconstitutional for purposes of equal protection.

Further, with regard to Plaintiffs' due process arguments, the Defendants maintain that a remedy can be limited, and as such, the dismissal of Plaintiffs' claims is not violative of due process guarantees. This position is likewise unsupported by the reality of this situation.

Finally, Defendants maintain that as the alter ego of the state, including that it is a state agency, that it is not a "person" within the meaning of 42 U.S.C. § 1983. However, the actual facts in this case clearly establish that in fact the Defendants are "persons" for purposes of 42 U.S.C. § 1983.

It should also be noted that several of Plaintiffs' arguments, as contained in Plaintiffs' Opening Brief were not addressed. As such, rather than reassert those arguments herein, Plaintiffs incorporate herein by reference those arguments.

II.
ARGUMENT

A. THE COLORADO GOVERNMENTAL IMMUNITY ACT. AS APPLIED TO PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF IS UNCONSTITUTIONAL

1. *THE STRICT SCRUTINY STANDARD IS APPLICABLE IN DETERMINING THE CONSTITUTIONALITY OF THE COLORADO GOVERNMENTAL IMMUNITY ACT AS APPLIED TO THE DEFENDANTS*

As outlined in Plaintiffs' Opening Brief, when a classification creates a suspect class, such as one which interferes with a fundamental right, a strict scrutiny standard is to be applied, i.e., the statutory classification must relate to a compelling governmental interest. *Tassian v. People*, 731 P.2d 672, 675 (Colo. 1987). It has further been recognized that a right to damage for an injury is property. *Rosane v. Senger*, 149 P.2d 372, 375 (Colo. 1944). See also *State v. DeFoor*, 824 P.2d 783 (Colo. 1992). Article II, § 6 of the Colorado Constitution provides:

> Courts of justice **shall** be open to **every person,** and a **speedy remedy afforded for every injury to person, property or character;** and right and justice should be administered without sale, denial or delay. (Emphasis added).

The foregoing clearly establishes that for all injuries to person, property of character a remedy shall be provided, along with access to the courts. It also establishes that a fundamental right is affected if access to the courts is denied, or if a remedy is not afforded for an injury to a person, property or character. In the instant action, such a denial has occurred, and as such, the Defendants must establish a compelling governmental interest.

As set forth hereinafter, no such compelling governmental interest exists. Further, as set forth hereinafter, even if the lower reasonableness standard were to be applied, it is clear that the CGIA, as applied to the Defendants is still unconstitutional.

2. *NO REASONABLE BASIS EXISTS TO SUPPORT A FINDING THAT THE COLORADO GOVERNMENTAL IMMUNITY ACT IS CONSTITUTIONAL AS APPLIED TO THE DEFENDANTS*

The Defendants, in support of its contention that a reasonable basis exists for its assertion that the CGIA is constitutional as applied to them maintains the following:

1. Defendants are insurers of last resort;

2. Defendants must provide insurance at the lowest possible premium;

3. Defendants are included in the State's Risk Management Fund, and claims and defense costs are paid from said fund. As such, fiscal planning and conservation of taxpayer monies is involved; and

4. Defendants cannot declare bankruptcy.

More specifically, the Defendants maintain that each of the foregoing may have been a reason why the legislature would legitimately want to include the Defendants in the CGIA. However, upon reviewing each of these items, it becomes abundantly clear that not only do these items not support the Defendants' contentions, but that the Defendant has misstated each of the items referenced.

First, with regard to its contention that Defendants are insurers of last resort. In the Defendants' own brief, it states that Defendant CCIA may reject an application for worker's compensation insurance. Further, the statutes provide for an employer to be self insured or to participate in a risk pool. As such, no protection is required on the basis that Defendants are insurers of last resort, as the legislature specifically addressed this issue by determining other methods of obtaining insurance. Further, pursuant to C.R.S. § 8-45-113, the Defendants can cancel a policy. In addition, as Defendants **do** decline insurance applications, the legislature would have no reason to provide protection on that basis.

Second, with regard to Defendants' assertion that it must provide insurance at the lowest possible premiums, C.R.S. § 8-45-106 provides:

> It is the duty of the board, in the exercise of the powers and discretion conferred upon it by articles 40 to 47 of this title, ultimately to fix and maintain, for each class or occupation, the lowest possible rates of premium **consistent with the maintenance of a solvent Colorado compensation insurance authority fund, and the creation and maintenance of a reasonable surplus after the payment of legitimate claims for injury and death, that may be authorized to be paid from the Colorado compensation insurance authority fund for the benefit of injured and dependents of killed employees.** (Emphasis added).

What is clearly evident from the foregoing is that in fact, the Defendants are not required to provide insurance at cost, but rather to provide the lowest premiums possible in light of their need to maintain reserves and remain solvent. This factor is the same as for any other insurance company, i.e., that they provide as low a premium as possible to remain competitive while ensuring that it can meet its obligations. As such, this factor does not provide a basis for providing the Defendants immunity, especially when the Defendants can avoid high risk clients just as a private insurance company would.

Third, with regard to its contention that inclusion in the risk management fund, and its contention that any claims would be paid out of such fund, these contentions are false. Specifically, C.R.S. § 8-45-101(1) provides:

> There is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for purposes of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., and except for inclusion in the risk management fund and by the division of risk management as provided in part 15 of article 30 of title 24, C.R.S.

Pursuant to C.R.S. § 24-30-1502, the Defendants are considered a state agency for risk management fund purposes. C.R.S. § 24-30-1510(3) provides:

Expenditures shall be made out of the risk management fund in accordance with subsection (1) of this section only for the following purposes:

(a) To pay liability claims and expenses related thereto, brought against the **state**, its officials, or its employees pursuant to the "Colorado Governmental Immunity Act", article 10 of this title, and claims against the **state**, it officials, or its employees arising under federal law, which the state is legally obligated to pay and which are compromised or settled pursuant to section 24-30-1515 or in which a final money judgment against the state has been entered;

(b) To pay the administrative costs of operating the division and the costs of purchasing services pursuant to sections 24-30-1506, 24-30-1507, and 24-30-1513;

(c) To procure and pay premiums for one or more policies of insurance purchased pursuant to this part 15 to protect against all or any portion of the potential liabilities of the state of Colorado or of any **state agency** or its officers and employees;

(d) To pay any deductible or self-insured retention contained in any insurance policy purchased by or at the direction of the division;

> (e) To pay liability claims and expenses related thereto **when a state agency has contracted to defend and hold harmless the owner of property leased to the state agency for a state purpose if such contract limits the state's obligation to claims arising from alleged negligent acts or omissions of the state agency and of its public employees which occurred or are alleged to have occurred during the performance of their duties and within the scope of their employment, except where such acts or omissions are willful and wanton.** Such claims shall be subject to limitations of the "Colorado Governmental Immunity Act", article 10 of this title. No such contract shall be valid unless approved in writing by the state risk manager and meets the requirements of this paragraph (e). (Emphasis added).

Further, 24-30-1510(4) provides that the fund is not to be utilized for any claim not set forth in subsection (3) above. As such, it is clear that the payment of any claim, or the costs associated therewith cannot be obtained from the risk management fund, as such payments are limited to obligations of the state, not state agencies. Further, based upon the definition of state agency in this section, as well as its inclusion in a portion of subsection (3) above, if it were intended that they be included, they would have been so identified. As such, the legislature would have no reason to nor did they provide protection to the Defendants on the basis of fiscal planning, as any moneys due would have to be paid by the Defendants out of their own separate funds.

This belief is further supported by C.R.S. § 8-45-102 which provides that the Defendants have their own funds, control over their own funds, the general fund cannot obtain the funds, the basis for said funds is the premiums they collect, and that said funds are to be utilized in the payment of their obligations. Additionally, C.R.S. § 8-45-103 provides that the Defendants can sue or be sued relative to any matters associated with its operation. As such, it was not intended that the Defendants be included in the risk management fund relative to its operation, but rather that the Defendants would be a self-sufficient operation. Therefore, the Defendants' arguments concerning fiscal planning are erroneous.

Finally, with regard to its contention that the Defendants cannot go out of business or declare bankruptcy, it provides no support for this contention, and as such is without merit. What evidence does exist is that the Defendants have the ability to establish whatever premiums are necessary to remain solvent, they can decline to insure and/or cancel an entities insurance, they can sue or be sued, and they must pay their obligations, just like any other insurance company. This fact is confirmed by the Defendants negative cash situation a few years ago, while they now have a cash surplus. No state monies were utilized to rectify the Defendants' financial position, but rather increased premiums resulted in this turnaround. As such, no basis exists for its contention that the legislature may want to protect Defendants since they cannot declare bankruptcy.

B. ***DISMISSAL OF PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF IS VIOLATIVE OF THE EQUAL PROTECTION OF THE LAWS***

The Defendants assert that tort claimants recovery may be restricted, and that the fact that an act treats different people differently will not render a statute unconstitutional. However, the Defendants fail to address the Plaintiffs' contention that the treatment must be based upon differences which are real and not illusory. *Tassian v. People*, 731 P.2d 672 (Colo. 1987).

In this case, the Defendants do not, because they cannot, establish any real difference between the Plaintiffs in this case, and an individual who obtained worker's compensation insurance from State Farm Insurance Company. The fact of the matter is, the only difference is the "private" insurer chosen, which often times is not in the hands of the employee. It should also be noted that on this point, the Defendants did not refute the Plaintiffs arguments. As equal protection requires that this element be established, the CGIA in this circumstance is violative of Plaintiffs' constitutional rights. Further, as outlined hereinabove, no legitimate state interest will be furthered by the preclusion of Plaintiffs' claims.

Finally, it should be noted that contrary to the Defendants' assertions, Plaintiffs' remedy is not just being limited, it is being eliminated, and as such, the Defendants contentions relative to same are inapplicable. What is clearly evident, is that Plaintiffs' claims should be reinstated, as the CGIA in this case is violative of equal protection of the laws.

C. *DISMISSAL OF PLAINTIFFS' SECOND THROUGH SEVENTH CLAIM FOR RELIEF IS VIOLATIVE OF THE DUE PROCESS GUARANTEE*

As recognized in *State v. DeFoor*, 824 P.2d 783 (Colo. 1992) a person cannot be deprived of a property interest without due process of law, and no due process can occur unless that party has his day in court. In response, the Defendants argue that a remedy can be limited, and that that is all that is occurring in the instant action. This position is ludicrous.

The Plaintiffs' claims, in their entirety, were dismissed. As such, the Plaintiffs have no claim at all for the damages caused by the Defendants' actions. Furthermore, even if it were to be assumed that a remedy was being limited, in this case, the remedy is being eliminated. The elimination of a remedy is in fact an elimination of the right. For what good is a right to sue if no remedy is available upon enforcing such right. As such, the Defendants' contentions lack merit and should be disregarded.

D. *THE DEFENDANTS ARE PERSONS AS DEFINED BY 42 U.S.C. § 1983*

The Defendants assert that they are the alter ego of the state because they are entirely dependent upon the state for funds and resources to respond to a suit for damages. In fact, that is the only response to the Plaintiffs' contentions as contained in their Opening Brief. As such, the arguments contained therein are confessed. In any event, the Defendants' contentions lack all merit and should be disregarded.

Specifically, as outlined hereinabove, pursuant to statute, the Defendants are entirely self-sufficient for virtually all purposes. Further, with regard to funds to defend or otherwise respond to suits for damage, it is also absolutely clear that the Risk Management Fund may not

be utilized for such a purpose, nor may any judgments be paid out of such funds. Accordingly, the Defendants are not dependent upon the state for funds to respond to a suit for damages. Finally, pursuant to the express holding of this Court in *Wigger v. McKee*, 809 P.2d 999, 1003 (Colo.App. 1990), the Defendants are persons within the meaning of 42 U.S.C. § 1983. As such, the dismissal of Plaintiffs' claim on the grounds that the Defendants are not "persons" within the meaning of the statute is erroneous.

III.
CONCLUSION

For the reasons outlined hereinabove, Plaintiffs respectfully request that this Court reinstate the Plaintiffs' claims, declare the CGIA unconstitutional as applied to the Defendants, and grant them such other and further relief as is deemed just and proper.

DATED this 15th day of July, 1994.

Respectfully submitted,
ANDREW T. BRAKE, P. C.

By /s/ Lee T. Judd
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CERTIFICATE OF MAILING

I hereby certify that on this 15th day of July, 1994, true and correct copies of the above and foregoing **REPLY BRIEF OF PLAINTIFFS-APPELLANTS MARK SIMON, CHERYL SIMON, AND MALACHAI SIMON** were placed in the United States mail, postage prepaid, addressed to the following:

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Golden, Colorado 80402

/s/ Donna L. Swanson

SIMON. REP/LHD

APPENDIX D

No. 97-1302

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE COMPENSATION INSURANCE AUTHORITY and COLORADO COMPENSATION INSURANCE AUTHORITY,
Petitioners,
vs.
MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Colo. Rev. Stat. § 8-40-301(5) and (6):

8-40-301. Scope of term "employee".

. . . .

(5) "Employee" excludes any person who is working as a driver under a lease agreement pursuant to section

40-11.5-102, C.R.S., with a common carrier or contract carrier.

(6) Any person working as a driver with a common carrier or contract carrier as described in this section shall be eligible for and shall be offered workers' compensation insurance coverage by the Colorado compensation insurance authority or similar coverage consistent with the requirements set forth in section 40-11.5-102 (5), C.R.S.

24-10-103. Definitions.

. . . .

(5) "Public entity" means the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdi-

vision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation only between or among the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof.

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